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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1407

RODMAN & RENSHAW,

Petitioner,

vs.

ROBERT AND SANDRA SCHAEFER, ET AL.,

Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The merit of Rodman & Renshaw's position in its Petition for this Court's writ of certiorari is magnified by the Respondents' opposition thereto. Respondents do not attempt to discuss or distinguish any of the cases cited by Petitioner and relied upon by Petitioner to show the inconsistencies and conflicts of the Seventh Circuit opinion with governing authority. Instead Respondents seek to convince this Court that the issues are not as portrayed by Petitioner and hence should not be reviewed. Respondents are egregiously in error.

I.

Respondents first seek to dodge the issue, as to whether the specific limitations of Section 9(e) of the Securities Exchange

Act of 1934 may be evaded by permitting an action to be maintained under Rule 10(b)(5), by asserting that their claim would not be barred by 9(e)'s limitations (Brief pp. 2, 8).

Respondents are not candid in this position. In their brief in the Court of Appeals, they conceded that they had waited more than a year, after learning in August of 1967 of the conspiracy, to file their action. The action was filed in February, 1969, approximately eighteen months *after* Respondents acquired this knowledge, well beyond the one year period permitted by Section 9(e). The Court of Appeals also "found" (Pet. App. p. A-35) "The plaintiffs discovered the existence of the fraud in August, 1967."

In addition, Nagorsky's employment with Rodman had been terminated, ending Rodman's liability for his allegedly fraudulent conduct, in October of 1965, more than three years prior to the filing of the action.

On these facts, the action for market manipulation on a national exchange under Section 9(a)(2) would be time barred under Section 9(e). The only reason for resorting to the Rule 10(b)(5) claim is to avoid that bar.

II.

Respondents urge (Brief, p. 9) that the Court of Appeals did not decide whether or not a right of action may be implied under Section 17 of the Securities Act of 1933. The language of the opinion permitting Petitioners to maintain the action is described as "sound dictum."

The effect of the Court of Appeals decision was and is to permit Petitioners to maintain the present action under Section 17. The refusal of the Court of Appeals to rule has the effect of a refusal to grant Rodman's motion to strike this claim. This refusal is hardly dictum. Negatively, the Court has ruled. It has ruled in a manner inconsistent with the precedent cited, precedent to which Respondents have not seen fit to respond.

III.

Respondents urge (Brief, pp. 6-8) that this Court's holdings in *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972) and *Superintendant of Insurance* v. *Bankers Life and Casualty Company*, 404 U. S. 6 (1971), permitting an expansive construction of the Securities Acts, somehow justify the failure of the Court of Appeals in the present case to construe the 1934 Act at all.

The Court of Appeals, in reference to the Securities Act aspects of the use, simply ignored the rules of construction urged by Rodman there and in the present petition for certiorari. Anomalously, the Court applied these rules in determining that Respondents' claim could not be asserted under the Sherman Act. These rules emphasize that a particular remedy governs over a remedy granted by general language in the same or another statute. Respondents ignore these basic canons in their present brief, canons bearing this Court's imprimatur as well as those of various circuit courts, and yet Respondents solemnly assure this Court that the Court of Appeals' decision does not conflict with any decisions of this Court or any Court of Appeals.

The rule of "liberal" construction is simply not a license to avoid construction. The remedial purpose of Congress, invoked as the touchstone for the "flexibility" urged, is not served by ignoring Congressional intent expressly manifested in the limitations periods and other incidents of the Section 9 remedy.

IV.

The argument of Respondents on pages 10-12 of their Brief quarrels with Rodman's position that the issue of tolling in the present case is the same as that involved in *Hochfelder* v. *Ernst & Ernst*, 503 F. 2d 1100 (7th Cir. 1974) upon which this Court has granted certiorari on April 14, 1975, docketed here as No. 74-1042.

Here the Court of Appeals did, as Rodman stated in its Petition, permit the statute to be tolled as to it as one who "negligently facilitate(d) the fraud" (Pet. App. pp. A31, 32). The Court did also state, as Respondents now point out, that there was language in "their original claim for relief" alleging "direct participation in the conspiracy to manipulate the price of Hercules stock as well as negligent facilitation" (Pet. App. p. A32). This charge of direct participation was not repeated in the amended claim which was before the District Court at the time of Rodman's dismissal and so was not properly before the Court of Appeals. In deference to the Court of Appeals, it does not appear that its decision was based upon any charge of direct participation in the fraud, but was explicitly and repeatedly related to the charge of negligence which facilitated the fraud.

Respondents, either inadvertently or deliberately, refuse to recognize that the tolling issue is as stated by Petitioner. Their purblindness as to this issue precludes their appreciation that conflict does exist in the current holdings of the Seventh Circuit on this point and the judicial refusals to toll limitations as to those only charged vicariously with fraud relied upon in the Petition. For purposes of Rule 19, a conflict may exist either as to cases of ancient or recent vintage. Here the conflict exists as to both.

Finally, Respondents claim (Brief, p. 11) that Rodman concedes that the statute of limitations is tolled generally, as to claims based on fraud, until the fraud is or should be discovered. Petitioner not only disclaims such a concession, but can only marvel at the disingenuousness with which Respondents assert it as Petitioner's position. The whole thrust of Petitioner's argument with reference to *Bailey* v. *Glover*, 88 U. S. 342 (1875), its forebears and its progeny, is that its tolling doctrine applies *only* to those committing the fraud.

For the foregoing reasons and for the reasons stated in the Petition filed herein, this Court's writ should issue to the

Seventh Circuit Court of Appeals and its decision reviewed and rectified.

Respectfully submitted,

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